

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

HAROLD ABBOTT

Claimant

VS.

HUGOTON TRUCK SERVICE

Respondent

AND

INSURANCE COMPANY OF NORTH AMERICA

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 164,521

ORDER

The Kansas Workers Compensation Fund requested Appeals Board review of an Award entered by Administrative Law Judge Thomas F. Richardson dated September 21, 1994. Oral argument was held in Wichita, Kansas.

APPEARANCES

Respondent and its insurance carrier appeared by their attorney, P. Kelly Donley of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Orvel Mason of Arkansas City, Kansas. Claimant appeared not, having previously settled his claim with respondent and its insurance carrier on April 15, 1992.

RECORD AND STIPULATIONS

The Appeals Board reviewed the record and adopted the stipulations listed in the Award.

ISSUES

All issues between the claimant and the respondent were settled in a Settlement Hearing before a Special Administrative Law Judge on April 15, 1992. At that time, all issues between the respondent and the Kansas Workers Compensation Fund (Fund) were reserved for future determination. The Administrative Law Judge in his Award dated September 21, 1994 assessed all of the liability for the settlement, fees and costs of the claim against the Fund. From that Award, the Fund appealed and asked the Appeals Board to review the issue of whether all or any portion of the claim should be assessed against the Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs and arguments of the parties, the Appeals Board finds as follows:

The Award of the Administrative Law Judge that assessed all of the liability of the claim to the Fund should be reversed.

Respondent, Hugoton Truck Service, hired the claimant sometime in the latter part of 1989 to drive a truck owned by the respondent and leased to Martin Trucking. Claimant injured his back while he was employed by the respondent and while delivering grain products for Martin Trucking on May 22, 1990. Before claimant commenced working for the respondent, he was employed as a part-time truck driver for Martin Trucking.

The lease agreement between respondent (Lessor), as an independent contractor, and Martin Trucking (Lessee) required respondent to provide the truck and driver for the purpose of transporting grain products for Martin Trucking to various locations. The respondent was responsible for providing all the maintenance of the truck, the salary of the truck drivers and the workers compensation insurance coverage for the truck drivers. Martin Trucking was required to maintain liability insurance on all of the trucks and cargo.

In order to maintain the liability insurance, Martin Trucking required all drivers of leased trucks to meet all the requirements of the Motor Carrier Safety Regulations. These regulations required, among other things, for the driver to have a current medical examination certificate, drivers license, pass a written examination and have a good driving record. Because of this requirement, Martin Trucking had reviewed claimant's records and verified the claimant met all of the Motor Carrier Safety Regulations. Included in claimant's file was a Physical Examination Report dated August 11, 1989 that showed claimant had a previous back injury which resulted in a fusion.

An employer may shift liability to the Fund for all or a portion of the compensation awarded if the employer employed or retained an employee with knowledge of a preexisting impairment which would constitute a handicap in obtaining or retaining employment and if the injury would not have occurred "but for" or the resulting disability was contributed to by the preexisting impairment. See K.S.A. 1989 Supp. 44-567. Respondent has the burden of proving that it knowingly retained a handicapped employee. See Spencer v. Daniel Constr. Co., 4 Kan. App. 2d 613, Syl. ¶ 1, 609 P.2d 687, rev. denied 228 Kan. 807 (1980).

The record in the instant case established that claimant had a previous back injury that resulted in a back fusion. The Appeals Board finds that the claimant, because of his prior back injury and subsequent back fusion, was a handicapped employee within the meaning

of the Workers Compensation Act. See Ramirez v. Rockwell Int'l, 10 Kan. App. 2d 403, 406, 701 P.2d 336 (1985). Greg Loebel, co-owner of the respondent, established through his testimony that the respondent did not have knowledge of claimant's previous back injury until after claimant injured his back while employed by the respondent. However, respondent argued that Martin Trucking was an agent of the respondent for the purpose of hiring the claimant. The respondent contended that since Martin Trucking was the agent of the respondent and had knowledge of claimant's impairment, such knowledge was imputed as a matter of law to the respondent as the principal. See Holley v. Allen Drilling Co., 241 Kan. 707, 740 P.2d 1077 (1987).

The Administrative Law Judge agreed with the respondent and found that an agency relationship did exist between the respondent and Martin Trucking. He then imputed the knowledge of claimant's preexisting back condition to the respondent as the principal. The Appeals Board disagrees. The record in the case at hand does not establish an agency relationship between the respondent and Martin Trucking. The record is clear that claimant was an employee of the respondent and not of Martin Trucking. The lease agreement between the respondent and Martin Trucking required respondent to provide workers compensation coverage for their truck drivers. The record is also clear that Martin Trucking did not have a contractual responsibility to inform the respondent concerning any obligations that respondent or its employees had under the Kansas Workers Compensation Act. Martin Trucking was required by the lease agreement to ensure that all the truck drivers that delivered products met the requirements of the Motor Carrier Safety Regulations. These requirements had to be met in order to obtain liability insurance to protect Martin Trucking against third-party liability claims. Martin Trucking was not concerned with the requirements of the workers compensation law but was concerned with the requirements of the Motor Carrier Safety Regulations. The Appeals Board finds that an agency relationship did not exist between the respondent and Martin Trucking to inform the respondent in regard to the requirements contained in the Kansas Workers Compensation Act. The respondent was responsible for workers compensation coverage for its employees and the record is void of any evidence that the respondent either expressly or impliedly delegated such authority to Martin Trucking. See Professional Lens Plan, Inc. v. Polaris Leasing Corp., 238 Kan. 384, 390, 391, 710 P.2d 1297 (1985). In addition, respondent was an independent contractor and no knowledge can be imputed to the respondent because an independent contractor is not an agent. Hinton v. S. S. Kresge Co., 3 Kan App. 2d 29, 35, 592 P.2d 471, rev. denied 225 Kan 844 (1978). Accordingly, since an agency relationship did not exist between the respondent and Martin Trucking, no liability can be assessed against the Fund in this matter.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas F. Richardson dated September 21, 1994, should be, and hereby is, reversed; that the Fund has no liability in this matter; and that the administrative costs itemized in the Award should be, and hereby are, assessed against respondent and its insurance carrier.

IT IS SO ORDERED.

Dated this ____ day of April 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: P. Kelly Donley, Wichita, KS
Orvel Mason, Arkansas City, KS
Thomas F. Richardson, Administrative Law Judge
Philip S. Harness, Director